Filed 3/16/17 P. v. Shryock CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BONNIE JEAN SHRYOCK,

Defendant and Appellant.

F072337

(Super. Ct. No. F12905807)

OPINION

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Franson, J. and Smith, J.

Appellant Bonnie Jean Shryock, formerly known as Bonnie Jean Maury,[1] appeals from the partial denial of her petition for resentencing, filed pursuant to Proposition 47. Appellant contends the trial court wrongly placed the burden of demonstrating eligibility on appellant. Alternatively, appellant argues her conviction for second degree commercial burglary was eligible for relief, as it constituted shoplifting. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 6, 2012, appellant was charged with one count of second degree commercial burglary under Penal Code sections 459 and 460, subdivision (b).[2] Appellant pled nolo contendere on November 28, 2012, prior to any preliminary hearing. Appellant was initially granted probation, but was ultimately sentenced to a term of three years, divided between custody and supervised release, following a probation violation related to several new charges being brought.

With respect to appellant's underlying conduct, the probation report stated appellant had found a receipt for two 24" lightbulbs in the parking lot of a Home Depot. She then entered the store with an empty bag, collected the two lights, and returned them for cash, which she then used to purchase a box of staples and a soda before leaving.

Following enactment of Proposition 47, appellant filed a petition to have several of her convictions reduced to misdemeanors, one of which derived from the Home Depot incident. No documents were attached to the petition, which merely identified the case numbers related to appellant's request, and no written opposition was filed. At a hearing set on appellant's petition, the People conceded she was eligible for relief on all requested convictions, save for the second degree commercial burglary conviction

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[1] On appeal, this court's docket initially identified appellant as Bonnie Shyrock. The court has corrected the docket.

[2] All statutory references are to the Penal Code.

derived from the Home Depot incident. The People objected to resentencing on that conviction, stating, "Ms. Phillips has determined that [appellant] is not eligible for this one based on the fact that it was a fraudulent return for cash."

At this point, appellant's counsel stated, "at this time we're just going to object." The trial court then noted its prior rulings holding that appellant held the burden of proof for establishing eligibility before asking counsel "are you requesting an evidentiary hearing to establish the offense qualifies for Prop 47?" After a sidebar, counsel responded, "No, Your Honor." The trial court then denied appellant's petition with respect to this single count.

This appeal timely followed.

DISCUSSION

Appellant contends the trial court wrongly placed the burden on her to prove eligibility and, since the record was silent as to disqualifying factors, her petition should have been granted. In line with this argument, appellant contends the cases of *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*) and *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444 (*Rivas-Colon*), which relies on *Sherow*, were wrongly decided. As an alternative argument, appellant argues her conviction qualifies as shoplifting when considering the facts detailed in the probation report. This is so, argues appellant, because theft by false pretenses is equivalent to larceny in the shoplifting statute.

Standard of Review and Applicable Law

"In November 2014, California voters enacted Proposition 47, which 'created a new resentencing provision: section 1170.18. Under section 1170.18, a person "currently serving" a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor ... unless the court, in its discretion,

determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." ' " (*Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 448.)

"Proposition 47 added section 459.5, which classifies shoplifting as a misdemeanor 'where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950).' (§ 459.5, subd. (a).) '[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered "a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours," and whether "the value of the property that [was] taken or intended to be taken" exceeded $950. (§ 459.5.)' " (*Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 448.)

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*Sherow*, *supra*, 239 Cal.App.4th at pp. 879-880.)

As the trial court's eligibility determination is factual in nature, we review that determination for substantial evidence. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960; see also *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331; *Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 452, fn.4 [" '[T]he basic structure of Proposition 47 is strikingly similar to Proposition 36' and 'much of the appellate interpretation of Proposition 36 is likely relevant in the interpretation of Proposition 47.' "].)

Appellant's Petition Failed to Demonstrate Initial Eligibility

Appellant sought resentencing on the theory that her prior felony conviction for second degree commercial burglary would have been a misdemeanor under Proposition 47. The petition needed to demonstrate, therefore, that appellant had entered a commercial establishment with the intent to commit larceny, where the value of the property at issue was less than $950. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880 ["We

think it entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts, upon which his or her eligibility is based."]; *Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 449 [burden on petitioner to show value of stolen property was less than $950].)

The petition did not support this conclusion. There was no evidence included within the application demonstrating the value of the property stolen or even identifying the factual basis for the charges. Rather, as noted, appellant's initial petition was a single page that merely identified the case for which she sought resentencing. Thus, similar to *Sherow*, the "petition here gave virtually no information" regarding appellant's eligibility for resentencing. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880.) Despite this lack of information, the trial court, through the People's investigation and subsequent stipulations, was able to reduce several charges that were eligible for resentencing. On the remaining conviction, although made aware of the obligation to produce evidence to support her petition, appellant failed to offer any support for the claim her burglary conviction was eligible for resentencing, such as through evidence of an intent to commit larceny sufficient to satisfy the new shoplifting statute or as to the type or value of the property at issue.[3] As the burden was properly upon appellant to provide evidence of initial eligibility, the trial court's failure to independently identify whether additional facts made appellant eligible for resentencing was not erroneous.

Appellant contends that *Sherow*, and presumably any case following it, including *Rivas-Colon*, was incorrectly decided. We do not agree. We have independently reviewed the analysis in *Sherow* in light of appellant's arguments and appellant's reliance

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[3] While the probation report is contained in the appellate record, there is no indication it was before the trial court at the time of the hearing. Regardless, the parties dispute whether consideration of the report would be proper in the first instance. We need not resolve that dispute here, as appellant's petition failed to provide any facts in support of her claim and appellant's counsel directly rejected an offer to provide such evidence.

on *People v. Guerrero* (1988) 44 Cal.3d 343 and Proposition 36 cases such as *People v. Bradford*, *supra*, 227 Cal.App.4th 1322 and *People v. Manning* (2014) 226 Cal.App.4th 1133. We find the reasoning in *Sherow* persuasive and continue to follow it. In cases where one properly convicted and serving a valid sentence seeks a reduction of that sentence, it is perfectly reasonable to place the burden of demonstrating eligibility for a sentence reduction under Proposition 47 on the petitioner. (See *People v. Johnson*, *supra*, 1 Cal.App.5th at pp. 964-968.) This burden could have been met through a declaration or basic testimony, which the trial court offered appellant a chance to provide, concerning the underlying crime. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880.) The trial court therefore properly denied the petition.

Alternatively, relying on a recounting of the crime in the probation report, appellant contends her engagement in a theft by false pretenses qualifies as shoplifting and entitles her to relief. We do not agree. We recently analyzed the meaning of the shoplifting statute and found that larceny, as used in that statute, should be interpreted according to its common law definition. (*People v. Martin* (2016) 6 Cal.App.5th 666, 683, review granted Feb. 15, 2017, S239205.) As such, to be eligible, appellant must demonstrate an intent to commit a trespassory taking, among other elements. (*Id.* at p. 676.) The facts contained in the appellate record do not meet this requirement. As appellant concedes, her crime amounted to a theft by false pretenses. Appellant attempted to obtain money or goods through what was believed by the victim to be a valid transaction, thus failing to satisfy the common law definition of a trespassory taking. (*Ibid.*)

DISPOSITION

The order is affirmed.